



## **Costco v. Hoen: Next Steps**

### **Remaining Issues**

With its January 29 decision, the 9th Circuit Court of Appeals affirmed the legality of Washington's policy of uniform prices (including wholesaler's delivered pricing, ban on quantity discounts from manufacturer to wholesaler and from wholesaler to retailer and ban on credit between wholesaler and retailer). The Court also affirmed the 10 percent minimum mark ups from manufacturer to wholesaler and wholesaler to retailer.

The Court rejected the requirement of price posting coupled with a 30-day price hold. The WSLCB's existing electronic price posting system and hold is an efficient mechanism for the WSLCB to monitor and enforce uniform pricing requirements and the 10 percent minimum mark up.

### **Timelines**

- The Court's opinion invalidating the existing post and hold goes into effect at the time the Court issues a mandate.
- On February 19, Costco filed a petition for a rehearing by the panel or for an en banc review by the 9<sup>th</sup> Circuit. The Court has 21 days (until March 11) to announce whether it will act on Costco's request.
- If the Court agrees to consider Costco's request for rehearing the Court will not issue a mandate until it fully disposes of the request. The Court must issue the mandate 7 calendar days after it disposes of any petition for rehearing.
- If the Court denies Costco's request for rehearing, March 18 is the earliest date that the Court's decision invalidating price post and hold will take effect.

### **WSLCB Enforcement Approach Following Invalidation of Existing Post and Hold**

To ensure the WSLCB is able to monitor and enforce the uniform pricing regulations and the minimum mark up in a manner consistent with the 9<sup>th</sup> Circuit's opinion, the WSLCB is considering the enforcement mechanisms described below. These mechanisms would become effective the date of the Court's mandate.

- *Hold Period Eliminated:* The requirement to hold prices for a set period of time is eliminated. Licensees may change prices as often as they like, but must submit price changes to the LCB electronically.

- Price reductions maintained for 14 days or more are presumed to allow all interested licensees to purchase at the reduced price, and presumed to be compliant with uniform price requirements.
- Price increases that occur less than 14 days after a price reduction will trigger closer scrutiny by the WSLCB and may give rise to enforcement actions for violation of uniform pricing requirements.
- *Electronic Filing:* Manufacturers and wholesalers continue to submit price information electronically to WSLCB. However, the filing requirement applies only when new products are added or when previously filed prices are reduced or increased.
  - The submitted prices will be confidential and available only to the WSLCB for its internal investigative purposes. The kiosk function will be turned off and licensees will not be able to view prices of any other licensee.
  - Prices will be reviewed for compliance with the 10 percent mark up requirement and for compliance with uniform pricing.
- *Additional Enforcement Activity:* The WSLCB will employ additional methods to track and enforce compliance with the minimum mark up and uniform pricing requirements, such as scheduled audits, random audits and audits in response to complaints alleging licensee violations. Audits will consist of reviews of the prices filed with WSLCB and also of additional records requested and obtained from licensees.

### **February 20 Board Meeting**

The Board shared the proposal with stakeholders and attendees at the February 20 Board meeting. In addition, the Board accepted written comments on its proposal and will continue to accept written comments through February 29, 2008. Please email [PKD@liq.wa.gov](mailto:PKD@liq.wa.gov) to submit comments by Feb 29, 2008.

### **Current Status**

The 9<sup>th</sup> Circuit mandate remains on hold until the Court acts on the petition for rehearing filed by Costco.